1970

The Dilemma of Federal Impact Area School Aid

Minn. L. Rev. Editorial Board

Notes

The Dilemma of Federal Impact Area School Aid

I. INTRODUCTION

Since World War II the United States Government has built and staffed scores of bases and installations throughout the United States. The effects produced by these bases on their respective local communities have been as profound as they are varied. One such effect is that upon the local public school system. Real property, which previously had produced tax revenue to pay for the local educational system, was put beyond the reach of the local taxing authority. Simultaneously the obligations and costs of the school system were dramatically increased by the influx of children whose parents were employed or resided, or both, on the federal installation.[1]

Congress sought to alleviate this double burden with the passage of PL 81-874[2] in 1950, whereby federal funds were made available to affected local school districts according to a statutory formula which accounted for lost property tax revenues and the per pupil cost of educating the extra "federal" children.[3] At the same time, however, the school aid formulae of several states had already automatically begun meeting the costs of increased enrollments, and making up for the sharply reduced local financial capabilities, through increased state disbursements to local school districts. Such state school aid statutes were in most instances equalization plans, expressing the state policy that no student in a public school should receive a substandard education for want of adequate financing in his school district. In pursuit of this policy, the state, by one device or another, guaranteed a minimum per pupil dollar expenditure. The difference by which the revenues of a particular district fell short of the guaranteed minimum would then be made up by the state out of its general revenue.

Local taxes, of course, were almost invariably levied on real property within the district. Thus, when a district's tax base was reduced and the number of children in its school system increased by a federal installation and staff, the state's equalization formula automatically operated to restore the district's fi-

1. S. REP. No. 2458, 81st Cong., 2d Sess. 1 (1950).
2. 20 U.S.C. §§ 236-40 (1964).
3. 20 U.S.C. §§ 237-38 (1964).

nancial capability, to the extent that the local authorities were unable to meet the state established minimum per pupil expenditure. The net result was that some of the affected local districts enjoyed a nearly double recovery of their total burden attributable to the federal presence—once from the state and once from PL 874. Some states sought to minimize the overlapping of federal and state aid by providing that an amount equal to a fixed percentage of the aid received by a federally impacted local school district under PL 874 would be deducted from the district's gross entitlement under the state's school aid formula.[4]

Beginning in February, 1968, a series of taxpayer suits in federal district courts have challenged these state deduction provisions on the ground that they frustrated the congressional intent to aid the affected school districts and were consequently void under the supremacy clause of the U.S. Constitution.[5] Each case has held for the taxpayer-plaintiffs. The holding of the first case was written into PL 874[6] by the 90th Congress in 1968. States are now statutorily barred from deducting PL 874 aid from their own allocations to affected local school districts at the risk of having PL 874 aid cut off altogether for non-compliance.

The purpose of this Note will be to investigate the factual, legal and constitutional bases of these judicial and legislative decisions to determine whether they require the outcome which was reached. It will inquire into the implications of that result, both in terms of the actual effect on local school districts and with respect to basic constitutional doctrines. Particular attention will be given to the apparent misconstruction of the nature of the state deduction formulae and their interaction with the federal law.[7]

---

4. *E.g.*, Va. Acts of Assembly ch. 719, item 459(b)(6) (1966).

5. Shepheard v. Godwin, 280 F. Supp. 869 (E.D. Va. 1963); Hergenreter v. Hayden, 295 F. Supp. 251 (D. Kan. 1968); Douglas Independent Sch. Dist. No. 3 v. Jorgenson, 293 F. Supp. 849 (D. S.D. 1968); Carlsbad Union Sch. Dist. of San Diego County v. Rafferty, 300 F. Supp. 434 (S.D. Cal. 1969); Triplett v. Tiemann, 302 F. Supp. 1239 (D. Neb. 1969).

6. 20 U.S.C. § 240(d)(2) (Supp. 1969).

7. The terms "impacted school district" and "federal children" will appear throughout. Impacted school districts are those whose student populations have been substantially enlarged by the attendance of children of federal employees, and at the same time have lost local tax revenues formerly used by the local school system due to the acquisition of real property by the federal government. 20 U.S.C. § 236 (1964).

Federal children are those enrolled in the local school system whose parents reside or work, or both, on federal property within the district. 20 U.S.C. § 238 (1964).

II. THE CASES

There have been five cases to date which have reached identical results on the issue of state deduction of PL 874 aid,[8] largely because the latter cases substantially duplicate the first. Consequently, discussion of the issues will be confined to the first case.

A. SHEPHEARD V. GODWIN[9]

Under Virginia law all public school districts were required to spend a minimum amount of money each year for schools computed under a formula reflecting the number of teachers employed and the number of children attending school in the district.[10] To help defray the cost of this required minimum education program, the state made two contributions of education aid funds—a basic share and a supplemental share. The basic share equalled 60 percent of the cost of teachers' salaries.[11] The supplemental share consisted of whatever further amount was necessary to make up the district's mandatory minimum expenditure, but only after crediting the district with its revenues from the basic share, the local property tax and a fixed percentage of the funds receivable under PL 874.[12]

The purpose of the supplemental share was to equalize the educational opportunities of all children by making up the difference between the local district's own revenue and the amount required to be spent per pupil. Where, for example, the federal government built a naval base or a V.A. hospital, thereby rendering a large amount of land untaxable, and the district's schools took in the children of the installation's staff, the district's tax revenues would become insufficient to meet the mandatory per pupil expenditure. The state statute automatically covered the difference. But, more or less, so did the federal payments under PL 874. Thus, if the state required a per pupil expenditure of $500, but local income, in the face of a qualifying federal "impact," amounted only to $350 per pupil, the district would receive the missing $150 from the state. But the district would also receive a grant under PL 874 which approximated the whole cost

8. *See* note 5 *supra.*
9. 280 F. Supp. 869 (E.D. Va. 1968).
10. Va. Acts of Assembly ch. 719, item 459(c)(5) (1966).
11. *Id.*
12. 280 F. Supp. at 873. At one time the percentage deducted was 100, but in the contested school year it was 50 percent and at the time of trial it had been reduced to 33⅓ percent.

of educating the federal children. To a certain extent, this overlapping constituted a windfall to the impacted district. Consequently, the state reduced its supplemental aid by an amount equal to an established fraction of the amount to be received by the impacted local district under PL 874.

The plaintiffs argued that the deduction by the state burdened them as property taxpayers and to that extent directly contravened the intended effect of PL 874 in violation of the supremacy clause of the Federal Constitution. The plaintiffs also complained that the impacted local district was receiving less money overall under the Virginia deduction formula than it was meant to receive under PL 874, and that the difference being recovered by the state of Virginia[13] amounted to a diversion of PL 874 aid from the impacted district to the state, again in direct contravention of clear congressional intent.[14]

Virginia argued, in support of the reduction of state aid, that the state supplemental formula, aside from any federal aid, accounted for both the extra children and lost property taxes of the impacted district. Consequently, when federal aid directed to the same objective became available to the impacted district it was not unreasonable or unlawful for the state to reduce proportionately a corresponding part of its aid. This reduction of aid also furthered the underlying state policy of providing all children an equal educational opportunity through nearly equal per pupil dollar expenditures in all districts. To allow such districts to recover both state and federal aid directed to impact burdens would clearly violate this state policy.[15]

The court accepted both of the plaintiffs' arguments. It found that any deduction by the state pro tanto burdened plaintiffs as taxpayers, since it was assumed that the reduction of state aid left unalleviated part of the impact burden. This presumably then would have to be made up by local taxpayers. The court also found the purpose of the federal act to be that of "supplementing" local revenue, as opposed to replacing lost taxes. This finding was based on the court's assumption that the federal contribution under PL 874 was less than the property taxes which the federal property would have produced[16] and on its interpretation of certain language in the legislative history of the act. Having reached those conclusions, it was only a short step

13. Virginia was saving about ten million dollars annually.
14. 280 F. Supp. at 873-74.
15. *Id.*
16. *Id.* at 872-73.

to the further decision that Virginia could not diminish the effect or amount of federal aid received by impacted school districts without violating the supremacy clause. Specifically, the court found the Virginia deduction formula to have three effects, each prohibited by PL 874: (1) local taxpayers were reburdened with a portion of unindemnified impact costs, (2) students in the local schools were threatened again with insufficient facilities and programs due to reduced amounts of available school funds and (3) the *state* was enjoying the benefits of approximately $10,000,000 of federal money which PL 874 intended to go directly to the impacted school district.[17]

The state was therefore permanently enjoined from taking into account funds receivable by local school districts determining the eligibility of or amount to be received by local districts from the state. The result of the holding was effectively to preclude any attempt by Virginia to reduce the state response to the plight of impacted districts in any manner keyed to the federal response to the same problem.

In each of the four subsequent cases the purpose and effect of the state aid statute was the same—to equalize the per pupil dollar expenditures at a guaranteed minimum level in all the school districts of the state. The later decisions did extend *Shepheard* to the extent that they held the state deductions impermissible regardless of the state's purpose therein, and regardless of the subsequent use of the withheld state funds.[18]

III. THE SUPREMACY CLAUSE

A. Introduction

Each court which has considered the issues under discussion has cast its decision in terms of the supremacy clause of the Federal Constitution[19] by which the asserted conflict between state and federal legislation is resolved in favor of the superior federal law. The supremacy clause is therefore a convenient framework within which to analyze the cases and is an equally useful device for approaching the legislative history and operative effect of PL 874. Consequently, the court's doctrinal usage of the supremacy clause will be analyzed and then used as a structural device for further analysis of the *Shepheard* case.

A state law challenged under the supremacy clause has been

17. *Id.* at 874.
18. 295 F. Supp. at 852-54; 293 F. Supp. at 849-51.
19. U.S. Const. art. VI, cl. 2.

held to bear, as does a state enactment challenged under any other constitutional provision, an initial presumption of constitutionality which must be overcome by the challenger.[20] When the challenge arises out of an alleged *conflict* between state and federal acts, the supremacy clause operates to invalidate the constitutionally lesser state law only if

a) Congress has expressly pre-empted the field, leaving no room in which the state's concurrent power may operate;[21] or

b) there is a demonstrable conflict between the two acts in their operation, either in the actual results thereof or in their respective purposes and policies.[22]

In other words, the supremacy clause can operate in two circumstances. The first is in the narrow situation where the Congress has within the scope of its constitutional power expressly pre-empted the subject of the legislation. These issues are ordinarily quite easily solved given the above two conditions. The other situation is broader and under the term "operational conflict" may be characterized as a sort of implied pre-emption. Where a state law conflicts in a substantial manner with an otherwise valid federal act, the former must fall. Here, however, the question is not so easily answered. Difficult issues of interpretation of legislative intent, and the question of whether there is in fact any conflict, must be resolved. In any event, the state law is not to be declared unconstitutional under the supremacy clause except upon an examination of the particular facts of each case since it is important not to strike down a state law unless a clear case of pre-emption or a genuine conflict or impermissible overlapping of the laws is demonstrated.[23]

The argument made by plaintiffs in each of the five cases mentioned above was principally based on the operational conflict theory, that the state law operated directly to deprive them of a benefit expressly conferred by the act of Congress. Each court adopted this argument as a factual conclusion. But

20. Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932).

21. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (test is congressional intent which may be manifested in any of several ways) and cases cited; *see also* McCulloch v. Md., 17 U.S. (4 Wheat.) 316 (1819).

22. Hill v. Fla., 325 U.S. 538 (1945) (effect of enforcement of state act was to limit a federally created right); Free v. Bland, 369 U.S. 663 (1962) (state community property law cannot frustrate a federally created property right); Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 275 (1943) (state regulation which only increased milk prices did not so conflict with a federal act as to be unconstitutional, absent express congressional statement).

23. *See* Southern Pac. Co. v. Ariz., 325 U.S. 761 (1945).

each court also turned to the first doctrine, that of congressional pre-emption, for the legal basis of its respective holding. The *Shepheard* court read the language of PL 874 as itself intending to preclude any state involvement whatsoever in the disbursement of the federal aid. In each case the court expressed this conclusion directly after a statement of the arguments of the parties without any explicit consideration of the underlying facts or of the court's intermediate reasoning. So founded, the conclusion is something less than persuasive.

B. SUPREMACY CLAUSE DOCTRINE

Ordinarily a finding of statutory pre-emption, in the narrow sense, within the ambit of the supremacy clause has required proof of three elements:[24]

i) Congressional competence to pre-empt,
ii) Congress' manifest intent to pre-empt,[25] and
iii) actual overlapping of the two legislative enactments, irrespective of any actual hostility between the two.

The constitutional *power* of the Congress to pre-empt the treatment of impact-associated burdens may reasonably be conceded on such a narrow point as that presented. The area would seem to lie in the middle of the spectrum of concurrent power since regulation of school affairs is certainly within the retained police power of the states, while administration, regulation and protection of federal aid programs, regardless of the beneficiary, is equally clearly within the supreme power of Congress.[26]

Thus, were power the only test, it is most likely that once Congress expressly chose to regulate this narrow area, the states would be forbidden to interfere with that regulation in any way whatsoever.[27] But power is not the only consideration. The most important consideration, particularly in areas of concurrent power, has been held to be that of intent. Past decisions consistently have held that before a pre-emption is to be found, invalidating an otherwise valid state law, the Congress must have

24. Southern Pac. Co. v. Ariz., 325 U.S. 761 (1945); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

25. Penn Dairies v. Milk Control Comm'n, 318 U.S. 261 (1943).

26. *But cf.* Southern Pac. Co. v. Corbett, 20 F. Supp. 940 (1937) (commerce power may supersede state use or property tax authority). Compare in this context the situation under the commerce clause where Congress' power to pre-empt regulation of interstate commerce is indisputable (Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)), with any of the reserved powers of the states to regulate their internal affairs without federal legislative interference.

27. McCulloch v. Md., 17 U.S. (4 Wheat.) 316 (1819).

manifested a clear and definite intention to pre-empt.[28] The best evidence of this intent, of course, is an express statement. Short of that, however, the Supreme Court has found statutory pre-emption where "that was the clear and manifest purpose of Congress."[29] However, if the intent to pre-empt is not clear on the face of the act, the courts are loathe to imply it. In fact the Court has held that such an intent is not to be inferred "where the legislative command, read in the light of its history, remains ambiguous."[30]

C. Application of Supremacy Clause Doctrine to PL 874

PL 874 on its face is silent on the pre-emption issue—there is no express statement and the argument is at best dubious that the scheme of the act is so pervasive and exclusive as to preclude all state action on the same subject. The pre-emption issue developed in the cases in the form of a controversy over what word accurately characterized the nature of the aid given by PL 874. The *Shepheard* court found that the scheme of PL 874 was to "supplement" and not to "substitute." The choice of a word here was crucial since to the court each word carried its own contrary and controlling implication. "Supplement" suggested that the function of the aid was to bestow extraordinary benefit over and above the revenue available from all other sources. If this were the nature of the aid, any withdrawal of state aid keyed to the federal aid clearly diminished the effect and purpose of the federal aid. "Substitute," on the other hand, carried the notion that the nature of the aid was compensatory and restitutional. In that context state deduction of state aid is immaterial to the federal program provided the impacted district is still compensated and restored to its previous financial balance.[31]

However, this definitional approach to determine the pre-emption issue is misleading and simplistic. The two words

28. Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); McCulloch v. Md., 17 U.S. (4 Wheat.) 316 (1819).

29. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The Court continued:

> Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute.

Id.

30. Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 275 (1943).

31. *See* text accompanying note 37 *infra*.

around which the court weaves the fabric of its reasoning refer not to policies but to mechanics—the mere methodology by which an underlying policy or congressional intention is to be effectuated. Whether the inquiry be related to a question of silent pre-emptive intent or one of conflict of laws, it must focus upon that federal policy. Only an unequivocal ascertainment of the policy behind the federal statute will serve to answer the basic issues arising under the supremacy clause. This failure of the court to interpret the federal policy correctly is the source of its inability accurately to compare the federal and state programs and their harmonious interaction.

The inquiry, then, will henceforth be directed towards ascertaining what the federal policy actually was. Only then may it be decided whether there has indeed been either a pre-emption of the field or a conflict between state and federal law. Nevertheless, the discussion often must be framed in terms of the court's chosen "supplement/substitute" vocabulary in order to demonstrate that even on that level the conclusion reached is fundamentally untenable.

Perusal of the text of PL 874 will show no language to support the conclusion that the statutory scheme is one of "supplementation." Nor will the scheme of the act disclose the pervasive regulatory effect necessary to justify an inference of statutory pre-emption. At no time will the federal statute or any element of its history demonstrate any congressional policy which would conflict with a state program whose policy was equalization of dollar inputs into each school district. Indeed, it will appear that this was also the very intent of the Congress when it enacted PL 874.

IV. ANALYSIS

A. THE STATUTE[32]

The legislative scheme and intendment are spelled out in the act itself, PL 81-874.[33] Section 236 provides that the policy of the United States is "to provide financial assistance . . . for those local educational agencies upon which the United States has placed financial burdens by . . .": a) loss of taxable real property to federal ownership; b) enrollment of children whose parents reside and are employed on such federally owned prop-

32. PL 874 was codified as 20 U.S.C. §§ 236-40 (1964). The section references hereinafter will be to the Code sections.

33. 64 Stat. 1100 (1950).

erty; and c) enrollment of children whose parents are employed on such federally owned property.

Section 237 directs the United States Commissioner of Education to determine (1) those local school districts in which the federal government has since 1938 acquired ten percent or more of the previously taxable real property, (2) whether such a district is financially handicapped thereby and (3) whether the district is otherwise being compensated therefore by other federal aid or payments in lieu of taxes or by secondary economic benefits profiting the local educational agency. If the district qualifies as an impacted district under this definition, and is not otherwise being compensated through any of the specified federal payments, the district is entitled to compensatory federal aid, the amount thereof not to exceed the taxes that the occupied land would have paid if held in private hands.

Section 238 contains the formula by which the entitlement of an impacted school district is computed. For this purpose, two categories of children are defined:

(a) those whose parents reside and are employed on federally owned land;[34] and

(b) those whose parents reside elsewhere in the district and are employed on federally owned property.[35]

The formula consists of the multiplication of the local district's previous annual per pupil expenditure by the number of type "(a)" children and one half the number of type "(b)" children.[36] The federally owned property must lie within the district seeking to qualify.

Section 238 also specifies another minimum requirement for entitlement to PL 874 aid. The total number of federal children in the district must exceed ten and the lesser of three percent of the children in average daily attendance in the district, or 400 children. Section 238 further provides that should the payment computed under section 237 be insufficient to provide an educational level in terms of per pupil expenditure equal to that of a group of generally comparable but non-impacted local school districts in the same state, the Commissioner of Education may in his discretion increase the amount of aid available to the impacted district. The increased amount is not to exceed the aver-

34. 20 U.S.C. § 238(a) (1964).
35. 20 U.S.C. § 238(b) (1964).
36. 20 U.S.C. § 238(c) (1964). The first figure is the local contribution rate (LCR), and is the figure representing the impacted district's average per pupil expenditure in the second preceding year. The formula may be represented as follows: LCR(a+½b).

age per pupil expenditure of the group of comparable districts. Moreover, the Commissioner must determine that

a) the impacted local district is making a bona fide effort to raise revenue locally, and
b) fifty percent of the children in average daily attendance in the impacted district are residents of federally owned property, and
c) state compensation, adequate or not, is available to the local district without discrimination with respect to the federal children.

B. CONGRESSIONAL INTENT

The statutory language and scheme provide no support for the conclusions of the court. Thus, the court turned to the legislative history which consisted of the committee reports accompanying the act.

It was discussed earlier[37] how the *Shepheard* court felt that the particular word chosen to characterize the nature of PL 874 aid would carry controlling implications with respect to the supremacy clause issue. The choice of such a word was prompted by Virginia's second major argument that section 237 spelled out the nature of the aid allocated by section 238, and that that nature was essentially to *replace* lost local property tax revenue with federal aid dollars.[38] The court flatly rejected this argument. It asserted that Virginia had misapprehended the nature and effect of PL 874 aid, which the court concluded, was intended to "supplement" local revenues and not to "substitute" for lost revenues.[39]

Unfortunately, the *Shepheard* court never returned to this point to explain exactly where in the act or in the legislative history it found language to suggest that PL 874 aid was meant not to replace lost local revenues but rather to supplement whatever local revenues there were.[40] Nor does the court state the source of any inference to that conclusion. The court failed to address itself to the more material and relevant question of whether the congressional policy behind PL 874 comprehended a preclusion of all state regulation in the area.

37. *See* text accompanying note 31 *supra*.
38. *See* 20 U.S.C. §§ 237-38 (1964).
39. This theme was that seized upon by both the Kansas and South Dakota courts as the primary source of conflict between PL 874 and the respective state aid formulae.
40. *See* 280 F. Supp. at 872.

1. Intention Under The Statute[41]

The act and the materials of its legislative history prior to the 1968 amendment[42] uniformly manifest the intent that federal funds are meant to substitute at the local level for the property tax revenues lost when the federal government acquired land, and at the same time to help pay the expenses incurred in providing facilities and instruction for large numbers of federal children. To suggest otherwise, that this aid is to "supplement" local revenues, is to suggest that the policy of the act was to provide bonus or extra income to be added on top of the impacted district's gross revenue from all other sources. In fact, as will appear below, the policy of the act must have been one of restoration of the equality of dollar inputs to their pre-impact per pupil levels. The policy which the court rather obliquely imputes to Congress is one of requiring the state to continue in full its augmented aid while at the same time granting a large amount of federal aid over and above the state aid and of compelling this extraordinary largesse only to impacted districts. The court's conclusion is refuted by the mechanism of the federal aid formula, as well as by express language and obvious inferences in the rest of the act and the other elements of the legislative history.

The formula in section 238 which allocates PL 874 funds is controlled by the number of federal children in the impacted district and by a per pupil figure equal to the average per pupil expenditure of a group of comparable non-impacted districts. With respect to the latter limit, the Senate committee report said that the intention was that the groupings should be so arranged that as far as possible no impacted district would receive more per pupil than the prevailing per pupil allocation in comparable non-impacted districts.[43] The object was to restore equality between impacted and non-impacted districts and to prevent overpayment to the former, measured by the comparable non-impacted districts. This statement in the report tends to negate any inference that the nature of the aid is supplementary as opposed to compensatory, or that the policy was anything but the restoration of financial equality, as opposed to the bestowal of an arbitrary and extraordinary grant. In fact, the average figure for the group of non-impacted districts is the upper limit to the

41. *Compare* PL 89-750, 80 Stat. 1211 (1966).
42. *See* section B of part V *infra*.
43. S. REP. No. 1674, 89th Cong., 2d Sess. 13 (1966).

per pupil aid an impacted educational agency may receive,[44] again suggesting a purpose of restoring impacted districts to a position of relative financial balance and equality, rather than as the court implies, simple supplementation of local revenue.

Similarly, section 237 provides a basic upper limit to a local district's entitlement under PL 874 of the amount of property tax revenue which would have been generated by the federally owned land if it were in private hands. Clearly the implication from this is that the purpose of PL 874 dollars is to replace the tax revenues lost by providing funds up to but not exceeding the amount lost due to the federal presence. No more here than in section 238 can it be inferred that the congressional purpose was blindly to provide aid over and above the amount available to the impacted district prior to the federal contribution.

Section 236 which contains the declaration of policy and objective of PL 874 is at best ambiguous on the issue of "substitute" or "supplement." It contains the statement that the policy of the United States is "to provide financial assistance . . . for those local educational agencies upon which the United States has placed financial burdens . . . ."[45] Support for the view of the *Shepheard* court can be found here if one were to read "financial assistance" for burdens imposed as meaning supplementing, or adding on top of, local revenues in opposition to and to the exclusion of the idea of replacing lost revenues. This reading obviously is not compelled by the context of the section, nor is it even a particularly reasonable reading of what surely was meant to be quite general language. At any rate, it cannot be said that any language in sections 236 through 238 constitutes a "clear and manifest" expression of intention by Congress to pre-empt the subject of this legislation.

Moreover, in certain other federal aid to education programs, particularly the compensatory education program, where the purpose was avowedly one of bestowing *unequal* supplementary grants, the Congress was able to make quite plain what its intent was.[46] It has made no comparable statement here.

2. The Committee Reports

Ordinarily, statutory purpose is to be gleaned from the face of the statute alone. Where, however, that source is silent, the

44. 20 U.S.C. § 238(c) (1964).
45. 20 U.S.C. § 236 (1964).
46. Title I of the Elementary and Secondary Education Amendments, 80 Stat. 1191 (1966) and 81 Stat. 783 (1968).

Supreme Court has held it permissible to go behind the act to its legislative history to inquire further into both the implications of the act and the intentions of Congress.[47] The necessity of this step arises from the silence of the statute itself with respect to the issue of pre-emption—it is insufficient merely to point to that silence as impeaching the court. Affirmative evidence must be adduced in order to create a persuasive argument. Set out below are excerpts from the Senate report accompanying the bill which became PL 874. The Committee wrote:

> This section [237] provides that the Federal Government shall pay to each local educational agency which furnishes education to children residing on Federal property an amount per child roughly equivalent to the amount per child which other property owners in comparable communities pay toward the cost of educating children. . . .
>
> The payment per child residing on Federal property—i.e., the local contribution rate—is an amount equal to the current expenditures per child made from revenues from local sources in comparable school districts within the State. . . .
>
> The effect of the payments provided for in this section is to compensate the local educational agency for loss in its local revenues.[48]

The Committee that approved the initial bill evidently thought that it was passing an act which would provide to impacted school districts the difference between their prior financial position and their post-impact financial dilemma. The Committee's language is not that which one would expect to find used to express the desire to bestow a grant purely over and above the impacted district's total income from other sources. The language of the corresponding House Committee report is substantially identical, and suggests the same conclusion.

3. Prior Legislation

This conclusion is further strengthened by reference to two of PL 874's predecessors. PL 77-452[49] authorized the Federal Works Administrator to pay funds to "local school agencies requiring assistance that may be subject to a loss of tax revenues because of the acquisition or ownership of land by the Federal Government."[50] Similarly, an Act of October 14, 1940,[51] required managers of federal housing projects whose properties were exempt from local taxation to pay to the local educational agency

47. Penn Dairies v. Milk Control Comm'n, 318 U.S. 261 (1943).
48. S. REP. No. 2458, 81st Cong., 2d Sess. 2 (1950).
49. 60 Stat. 314 (1946).
50. *Id.*
51. 54 Stat. 1125 (1940), 42 U.S.C. § 1546.

an amount in lieu of taxes equivalent to the tax paid by similar property in comparable school districts. The purpose of the latter act was held to be to "equalize tax treatment between the sovereign and the private property owner similarly situated."[52]

Each of the above acts was designed to provide compensation to school districts in proportion to the financial burden imposed by federal ownership of property in the district, and to produce as a subsidiary effect the equalization of tax burdens on local private property so that property owners did not have to pay drastically increased taxes to make up for the lost revenues. PL 874 logically and functionally follows these acts, duplicating both their purpose and effect.

4. Summary

This section began with this question: Did Congress manifest an intent, clearly or otherwise, to pre-empt this legislative area with respect to state programs of the kind involved in *Shepheard*? In other words, was it the intent of Congress to bestow supplemental revenue over and above an impacted district's other income, or was its intent to provide funds specifically designed to cover particular losses and extraordinary costs? The answer to the second question, which PL 874 and the materials in its legislative history disclose to be the coverage of specific costs imposed on impacted districts, answers the first question in the negative. In the context of the particular state statute, its effect, and the rather clearly defined intendment of the federal act, the answer *should* have been "no": there was no congressional intent to preclude states from deducting in substance only their own increased aid when the need for it vanished.

C. OPERATIONAL CONFLICT

Since there is no legislative pre-emption inherent in the federal act with respect to the particular state action challenged in *Shepheard,* the only other reason the state act might run afoul of the supremacy clause is if it were shown to conflict in its operation with either the overall policy or the specific effect of the federal law.

52. New Castle v. United States, 162 F. Supp. 59 (D. Del. 1958).

1. *Purpose and Operation of the Acts*

(a) Virginia Law

One of Virginia's arguments in *Shepheard* was that since PL 874 paid the per capita cost of educating federal children, according to the formula of section 238, it was only reasonable that the state be allowed to withdraw from its aid allocation the identical state payments for the same children. To this the court replied that states had no business diverting PL 874 funds to themselves, since the federal children were paying their own way as far as the state was concerned.[53] The court had concluded that the state by deducting corresponding federal dollars from state aid was in substance intercepting federal aid dollars, diverting them from impacted school districts to the state and thereby placing the impacted district back where it had been before its impact woes were remedied by the federal aid grant.

This conclusion flows from the court's tacit assumption that the controlling object of the state's deduction provision was to reimburse the state treasury for state expenses associated with the federal presence. The court, to reach that conclusion, ignored the fact that the state school aid allocation had been previously increased to cover both the increased enrollment and the decreased tax base of the affected school district.[54] The court's assumption may have been prompted by the misleading appearance created by Virginia's practice of returning the money saved by the deduction directly to the state's general revenue fund. That the court's assumption regarding the purpose of the deduction is in fact false is clear from an inspection of the plan of the state allocation formula. It was designed only to prevent unnecessary and costly duplicate expenditures by the state and was never intended to have the purpose or the effect of compensating the state for its costs or of causing the substitution of federal funds for state aid obligations.[55]

(b) Federal Law

To support its conclusion that the intended effect of PL 874 was to supplement other local revenue the court cited first the report of the House of Representatives' Labor and Education Committee on the bill which became PL 874.[56] The report stated

53. 280 F. Supp. at 873.
54. *See* text accompanying notes 8 & 9 *supra.*
55. Va. Acts of Assembly ch. 719, item 459 (1966).
56. 280 F. Supp. at 874-75.

that the aid contemplated by the act was not meant to provide any compensation to the *state*, whose revenues, if anything, were increased by the federal presence. This increase resulted both from the secondary economic effects produced by the federal presence and from the necessary increase in *state* tax revenues from personal income, sales, excise, gasoline and other taxes.[57]

The *Shepheard* court derived a major element of support for its conclusion from the passage in 1966 of an amendment to PL 874 (20 U.S.C. § 240) adding section 240(d).[58] The amendment provided that the Commissioner of Education should, provided no inequity to the local district would result, reduce the aid payable to an impacted local district by the amount by which the state reduced its aid to that district below the state appropriation of the second preceding year. Arguing that this amendment directly supported its conclusion with respect to the intended effect of PL 874, the court quoted the following paragraph from the accompanying Committee report:

> Fifteen States offset the amount of Public Law 874 funds received by their school districts by reducing part of their State aid to those districts. *This is in direct contravention to congressional intent.* Impact aid funds are intended to compensate districts for loss of tax revenues due to Federal connection, not to substitute for state funds the districts would otherwise receive.[59]

The last sentence quoted explains and at the same time refutes the court's conclusion. Not only does the sentence restate the policy of PL 874 aid—to restore the financial equality of the impacted district—it also explains what the Congress thought the states were doing by deducting PL 874 funds. This sentence must be read in context with the first two. Thus read, they say, "By deducting PL 874 receipts from their own aid allocations, states frustrate the congressional intent to compensate impacted districts for lost taxes." But since neither in theory nor in actual dollar effect[60] does this result follow a state's deduction, it seems clear the Congress as well as the court failed to appreciate the fact that the state formula had, prior to the deduction, already accounted for the lost property taxes and increased financial responsibilities of the impacted district. Had it not, Congress would have been entirely correct—deduction from a state aid allocation that had *not* been increased in response to

57. H.R. REP. No. 2287, 81st Cong., 2d Sess. 39 (1950).
58. PL 89-750, 80 Stat. 1211 (1966).
59. H.R. REP. No. 1814, 89th Cong., 2d Sess. 36 (1966) (emphasis by the court).
60. Comment, 25 WASH. & LEE L. REV. 237, 242 (1968).

impact-associated burdens would indeed amount to an attempt by the state to substitute federal funds for state funds the district would otherwise receive. To contend that literally this argument applies just as well to the state's impact aid contribution refutes itself. It imputes to the Congress an intent to compel those states whose school aid formulas are responsive enough to local needs to cover impact-associated hardships to duplicate, without recourse, federal payments directed to precisely the same problem. It imputes to the Congress a purpose or policy of putting impacted districts, for the sole reason of their being impacted, in a strikingly unequal position vis-a-vis comparable unimpacted districts. This is precisely the opposite of the actual federal policy as manifested in the statute. This, however, is exactly the conclusion which the court reaches.

Earlier in the same report the now familiar language of the actual policy was reaffirmed: "The purpose [of PL 874] is to compensate local educational agencies for financial burdens imposed on them by Federal activities."[61] The report of the corresponding Senate committee is substantially identical in this respect.[62] An accurate understanding of the nature of the state deduction would show that the deduction in no way interfered with the benefit intended to be conferred by the federal act, nor did it counter the policy or purpose of the federal aid.[63]

The state school aid formula did not use federal funds to meet part of its supplementary aid obligation, reduce the state effort accordingly and thereby lessen the total amount of funds available to the impacted district. The formula had already fully accounted for all the federal children in the impacted district's

---

61. H.R. REP. No. 1814, 89th Cong., 2d Sess. 32 (1966).

62. The purpose of the two laws is to compensate local educational agencies for financial burdens imposed on them by Federal activities. The detailed provisions of Public Law 874 as originally enacted directed that school districts be compensated for a portion of the yearly operational cost of educating children living with a parent residing on or employed on Federal property which was not subject to taxation for school purposes. S. REP. No. 1674, 89th Cong., 2d Sess. 36 (1966).

The author inquired of Rep. Albert Quie (R.-Minn.), a member of the reporting Education and Labor Committee and one of the floor managers of the 1966 amendment, as to the intended effect of PL 874 and the new section 240(d). He replied:

> It was designed to provide local school districts with funds in lieu of taxes which would have been generated on privately owned property. I do not believe it was intended to provide supplemental revenues above and beyond the provision of normal per pupil expenditures.

63. *See* Comment, 25 WASH. & LEE L. REV. 237 (1968).

schools,[64] and had already fully allowed for and replaced the lost property taxes.[65] Only then was the deduction taken. Since there was no reason and certainly no justification for the impacted district to enjoy a nearly double recovery, the state decided to reduce proportionately a corresponding portion of its assistance when the federal government acted to alleviate the local financial distress. At first the amount so deducted was 100 percent of the PL 874 allottment. But it soon became apparent to the state that the limitations built into the formula of PL 874, coupled with the inherent imprecision of the state allocation and deduction formulae, kept the correspondence of the PL 874 grant and the state supplementary share from being exact. Consequently, the state deduction was reduced to 50 percent, then 33 1/3 percent, to prevent undue duplication of aid without threatening underpayment through total reliance on the possibly inadequate federal formula.[66]

2. Actual Dollar Effect

As a purely factual, dollars and cents, matter, the court was wrong in its characterization of the effect of the state deduction. Indeed, it appears that even under the state deduction formula, which the court held to be "inadequate to continue [the pre-impact educational expenditure] level for the increased school attendance"[67] and to burden pro tanto the taxpayer-plaintiffs as federal funds were "diverted," the impacted school districts of Virginia were not only enjoying an average per pupil income (from all sources and after the state deduction) *higher* than that of non-impacted districts, but the taxpayers of these districts were paying property taxes at a *lower* rate than taxpayers in neighboring non-impacted districts.[68] This factual showing alone refutes the contention acceded to by the court that the effect of the state plan was to burden the local taxpayers and to deprive their school children of equal educational opportunity. The state deduction, which allowed a 50 percent and then a two-thirds duplication of the PL 874 dollars, had precisely the opposite effect.

Obviously, an impacted district received less money after the deduction than it would have received without the deduction. But this is irrelevant to the issues involved. What must

64. Va. Acts of Assembly ch. 719, item 459 (1966).
65. *Id.*
66. *Id.*
67. 280 F. Supp. at 874.
68. Comment, 25 WASH. & LEE. L. REV. 237 (1968).

be determined, which the court failed to do, is whether the lessening of state aid, and the consequent reduction in the net amount finally received by the impacted district, conflicts with the manifest federal policy of creating or restoring a financial parity in per pupil resources as compared with similar, non-impacted school districts. The figures cited above prove conclusively that the deduction formula in no way adversely affected that policy. The contemplated equality was more than maintained by the state practice of deducting only a small fraction of PL 874 aid from its own augmented allocation.

3. Summary

It can be seen that there was in fact no operational conflict between the federal and Virginia legislation. The policy and effect of the former was to compensate impacted districts for the costs and other burdens imposed by the federal presence in the district. The Virginia plan conflicted with neither the policy nor the effect. The two complemented one another in operation, to the benefit of the taxpayers who complained, because the Virginia aid plan, *as a whole*, did not detract from the federal aid intended to be available to impacted local school districts. Plaintiffs and the court looked only to one portion of the whole state aid allocation formula,[69] and even then failed to consider the factual dollar effect of any portion or the entirety of the state scheme on the federal scheme. Indeed the *Shepheard* court, as did others, specifically refused to consider any factual proof offered by the state, choosing to rest the decision on the theoretical or legal basis of the purpose and intendment of the federal act.[70] Neither of the conditions necessary to invoke the operational conflict aspect of the supremacy clause are present.

Were a state to take steps to deprive an impacted district of the substantive compensatory effect of PL 874 aid, it is indisputable that a conflict of laws amounting to a violation of the supremacy clause would exist. To that extent, and to that extent only, Congress, by enacting PL 874 has manifested clear intent to preclude state action on the subject of the given legislation.

69. Specifically, the final deduction.
70. 280 F. Supp. at 874.

D. APPLICATION TO SUBSEQUENT CASES

The same considerations apply with equal force to the decisions in the four subsequent cases since the respective state school aid statutes, although flowing from somewhat different bases and along different lines from Virginia's, are functionally equivalent to Virginia's. When the percentage of PL 874 funds receivable was deducted from each, it was deducted from an allocation of state aid which had already been increased to reflect the impacted district's lost local tax revenues and increased obligations. Since the authority cited in the later cases is *Shepheard v. Godwin*, the showing of a lack of operational conflict in *Shepheard* is equally applicable to the others.

In one instance, specific data is available to demonstrate again that as a purely factual matter the basis of the court's conclusion is as wrong as its misapprehension of the legislative policy involved. The case is *Jorgenson v. Douglas Independent School District No. 3*, involving the South Dakota state aid to education statute.[71] The question these figures answer is whether the South Dakota deduction formula served to frustrate in any degree the express congressional policy and intended effect of putting impacted school districts in a financial position substantially equivalent to that of comparable, non-impacted districts in the state. The following figures are based on the school year 1966-67 and reflect the situation under the challenged deduction formula.

Douglas Independent is an all-urban district near Rapid City in Pennington County in southwestern South Dakota. The mill rate in the Douglas school district for the year 1966-67 was 27. The Pennington County average rate was 34, the statewide average was 31.54 and the state median was 32.74. The Douglas Independent cost per average daily attendance (the average amount per child spent annually in the district) was $552.98, the state average was $494.68 and the state median was $511.82.[72] From these figures it is apparent that in Douglas Independent, as in Virginia's impacted districts,[73] the property owners of the impacted district were paying taxes at a lower rate and getting more education per child, measured by per pupil expenditures, than were taxpayers in comparable non-impacted districts. Far from harming them, pro tanto or otherwise, the South Dakota

71. 293 F. Supp. 849 (D.S.D. 1968) construing S.D. COMPILED LAWS ANN. §§ 13-13-11 *et seq.* (1967).

72. South Dakota Dept. of Educ., South Dakota School Statistics, 1966-67 (S.D. Research Bulletin 45.6, 1968).

73. Comment, 25 WASH. & LEE L. REV. 237 (1968).

deduction formula, by deducting only half of a district's PL 874 allocation, left a 50 percent overlap, preserving a substantial benefit to taxpayers and their children.

V. THE CONSEQUENCES

A. VIRGINIA'S "PLAN B"

The practical result of these holdings is that the states are unable to prevent a nearly double repayment of impact-caused expenses and losses by means of a deduction from state funds keyed to the amount of PL 874 aid receivable by the impacted district. Apparently Virginia had anticipated the possibility of this outcome and provided for it with a contingency plan.[74] Under this plan it was provided that if the deduction formula should be declared unconstitutional, the double recovery of the local district would be avoided by the state's not paying the impacted district for conceptually half of the impact handicap: no payment would be made out of state funds for the cost of educating children whose parents resided or were employed on tax-exempt federal property. State supplementary aid would continue to reimburse the impacted district in full for lost property tax revenue. It was contemplated that the continued receipt of the entire PL 874 aid allocation would cover fully any excess direct cost of educating the federal children not met by reason of limiting the state aid to restoration of the lost local tax revenues. It was expected that this allocation of funds would leave the impacted district with approximately the same financial resources per pupil as it had enjoyed prior to the impact.

Although a superficial examination produces the impression of discrimination in the state's refusal to help pay for some of the federal children on the sole basis of their being federal children, nevertheless, the state plan would have affected neither the impacted district's receipt of state aid to replace lost tax revenues nor its receipt of PL 874 aid to pay the cost of educating the federal children. In actuality the plan discriminated against the affected children only to the extent that it refused to duplicate with substantially identical state payments the fixed amount of per pupil payments made under PL 874. Nor did this plan result in a dilution of the intended federal aid. PL 874 was designed to indemnify an impacted district for its federally caused economic hardships. PL 874's effectuality was never thought to

74. Va. Acts of Assembly ch. 719, item 459 (1966).

depend on parallel state payments. Thus the fact that Virginia voluntarily paid only half the cost—covering lost taxes—but refused to pay the other half of the impact burdens—the cost of educating federal children—should be wholly irrelevant to the efficacy of PL 874 aid in the impacted district. If PL 874 aid, because of this state reduction in aid, falls short of full satisfaction of its announced goal, the fault cannot be chargeable to the state aid formula.

Nevertheless, the contingency plan was challenged by the plaintiffs in *Shepheard* under the equal protection clause of the fourteenth amendment.[75] Their theory was that the contingency plan drew a discriminatory classification detrimental to federal children for no permissible or education related reason. The court agreed, concluding that enforcement of the plan would amount to a discrimination without any justification against federal children in the allocation of state money and was therefore unconstitutional.[76]

B. The 1968 Amendment to PL 874

The second result of *Shepheard* was the passage of an amendment in 1968 which added a new subsection to PL 874.[77] This section provides that no payments may be made to an impacted district in any year in which that district's state has considered PL 874 aid in determining the eligibility of the local district for state aid, or in determining the amount of such state aid in that or the preceding year, or which in any way diminishes on account of PL 874 the amount of aid to an impacted local district below what the district would otherwise receive from the state.[78] The committee report on the bill which added this new section said tersely, "The committee is recommending this amendment at this time in order to implement a decision by the U.S. District Court for the Eastern District of Virginia as a three-judge court."[79] The committee reported no further substantive consideration of the amendment. This is not surprising since the amendment appears reasonable on its face. Its effect is to codify *Shepheard,* but this adds nothing to the inquiry into congressional intent since it was illustrated earlier[80] that Congress mis-

75. U.S. Const. amend. XIV, cl. 1.
76. 280 F. Supp. at 875.
77. 20 U.S.C. § 240(d)(2) (Supp. 1969), and renumbering the former § 240(d) to § 240(d)(1). PL 90-576, 82 Stat. 1097 (1968).
78. 20 U.S.C. § 240(d)(2) (Supp. 1969).
79. S. Rep. No. 1386, 90th Cong., 2d Sess. 129 (1968).
80. *See* text accompanying note 43 *supra.*

understood the nature of the state deduction formulae it had condemned in 1966. Further, it was just that expression of intent that the *Shepheard* court seized upon and which the 90th Congress then passed into law.

This amendment was passed carelessly. There is no record of its having been given any serious independent consideration either in committee or on the floor of either House. In light of the underlying policy of equality and parity of PL 874, this amendment, which can serve only to produce or aggravate actual inequality and disparity as between impacted and non-impacted districts, is quite inexplicable. If the Congress means to effect such a fundamental alteration in the policy and purpose of the impacted area aid law, it should do so intentionally and consciously. Otherwise, the amendment should be repealed forthwith.

Ironically, the *Shepheard* court, before stating its order disposing of the case, observed that what it was seeking to accomplish by its holding was to preclude Virginia ". . . from hereafter in any way denying to the impacted area the exclusive use and enjoyment of the impact funds."[81] The court failed to understand that that was precisely the situation that had prevailed in Virginia prior to the *Shepheard* suit.

VI. CONCLUSION

The ultimate result of these cases is that states now must choose between allowing their impacted districts to benefit by receiving a double recovery of their impact burdens, or to provide only a single recovery entirely out of state funds. Since it is rather unlikely that a state will choose to pay by itself the entire cost of the federally caused impact burdens when virtually identical federal aid to the same end is available, states in all likelihood will opt to comply with *Shepheard* and section 240(d)(2), reasoning that as long as they will have to pay these impact costs once, it might as well be done in such a way as to bring a considerable amount of federal aid to the district at the same time.

Yet this result, which is the practical outcome of *Shepheard*, produces two constitutionally unacceptable conditions, each of which seems to violate the fourteenth amendment's equal protection clause. The first is produced by the state making an affirmative choice to allow considerable benefit to be

81. 280 F. Supp. at 875.

conferred on a class of people defined by the sole criterion of their residence. Benefits can no more be bestowed arbitrarily, here geographically, than can a discriminatory disability be imposed on a like basis within the ambit of the equal protection clause of the fourteenth amendment.[82] The other problem lies in the area of the emerging claim of a fourteenth amendment right of equal access to educational opportunity. The phrase has yet to take on much substantive content,[83] but it must at least include the concept that where the state undertakes to provide free public education to all children, it may not arbitrarily cause a considerably lesser or greater educational opportunity, measured by dollar expenditures, to be provided to a class defined by strictly geographical terms which have no rational relation to a permissible educational object, than it provides to all children.

Consideration of these equal protection issues in any greater detail is beyond the scope of this Note—they are mentioned only to suggest the incongruity of the result compelled by the *Shepheard* decision and section 240(d)(2). That the state's choice of the double compensation alternative is the necessary one is clear since the district courts surely did not intend to compel the only other choice, that of declining to participate at all in the beneficial scheme of PL 874.

Indeed, the incongruity and contradiction produced by the *Shepheard* holding, in the light of an accurate understanding of the nature and effect of the state school aid allocation statutes and the policy behind the federal act, are themselves the source of a strong inference that *Shepheard's* reading of the legislative intent of PL 874 was defective. Such a result as that produced should not be imputed to the Congress without a far more comprehensive, not to say convincing, exposition of that intent from the act and its accompanying historical materials than was made in *Shepheard v. Godwin.*

82. Minneapolis & St. L. Ry. Co. v. Beckwith, 129 U.S. 26, 31 (1889) (certain members of a class may not be given special privileges); *accord,* Hobson v. Hanson, 269 F. Supp. 401, 497 (D.D.C. 1967) (government action may not award unequal benefits or impose unequal burdens); Truax v. Corrigan, 257 U.S. 312, 332-33 (1921) (equal protection bars undue favor and privilege as well as hostile discrimination).

83. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); Hobson v. Hanson, 269 F. Supp. 401 (D.D.C. 1967). *But see* McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968) (otherwise valid state classification or program not rendered unconstitutional because some economic disparity results). *See also* Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined,* 35 U. CHI. L. REV. 583 (1968).